IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|---|---|---|
| WILLIAM B. and MAE B., | ) | |
| | ) | 2 CA-JV 2007-0068 |
| Appellants, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | MEMORANDUM DECISION |
| | ) | Not for Publication |
| ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ANJALI B., | ) | Rule 28, Rules of Civil Appellate Procedure |
| | ) | |
| Appellees. | ) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17199900

Honorable Charles S. Sabalos, Judge

AFFIRMED

---

The Law Firm of Frederick Lomayesva
By Frederick Lomayesva
Tucson
Attorney for Appellants

Terry Goddard, Arizona Attorney General
By Stacy L. Shuman
Mesa
Attorneys for Appellee Arizona
Department of Economic Security

---

P E L A N D E R, Chief Judge.

**¶1** William B. is the maternal grandfather of Anjali B., born in September 2004. William and his wife, Mae, the maternal step-grandmother,[1] appeal from the juvenile court's August 2007 order denying their motion to intervene in the dependency proceeding involving Anjali, which led eventually to the termination of the parental rights of Anjali's mother, Candy B. The grandparents' request for permissive intervention was made pursuant to Rule 24(b), Ariz. R. Civ. P. *See also* Ariz. R. P. Juv. Ct. 37(A) (including in definition of parties "any person or entity who has been permitted to intervene pursuant to Rule 24, Ariz. R. Civ. P."). We will not disturb the juvenile court's order denying the motion to intervene absent an abuse of discretion. *Allen v. Chon-Lopez*, 214 Ariz. 361, ¶ 9, 153 P.3d 382, 385 (App. 2007). On the record before us, we cannot say the juvenile court abused its discretion. Therefore, we affirm.

**¶2** Anjali was adjudicated dependent in March 2005. At the end of October 2006, the juvenile court found Candy had not been in compliance with the case plan and approved a plan of severance and adoption, directing the Arizona Department of Economic Security (ADES) to file a motion to terminate Candy's parental rights, which it did immediately. Anjali's father relinquished his parental rights in February 2007. Candy failed to appear at the initial severance hearing, and the juvenile court granted ADES's motion on March 5, 2007, terminating Candy's rights on the grounds of neglect or willful abuse, *see*

[1]Although Mae B. is Anjali's step-grandmother, we refer to William and Mae together as the grandparents without making that distinction because none has been made previously in these proceedings.

A.R.S. § 8-533(B)(2), and the fact that Anjali had spent longer than fifteen months in a court-ordered, out-of-home placement, *see* § 8-533(B)(8)(b). This court affirmed the termination order on appeal. *Candy B. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2007-0020 (memorandum decision filed Nov. 28, 2007).

**¶3** In October 2006, the grandparents, who live in Texas, filed a motion to participate in the dependency proceeding pursuant to Rule 37(B), Ariz. R. P. Juv. Ct. The juvenile court denied the motion in a minute entry signed on November 3, 2006, after a permanency hearing that was held over five days between December 2005 and October 26, 2006. The minute entry stated that the court was "[l]imiting the participation of the maternal grandparents to the extent that they are currently participating." The grandparents did not seek appellate review of that order. In February 2007, they filed a motion to intervene in the dependency proceeding pursuant to Rule 24, Ariz. R. Civ. P. ADES filed its opposition to the grandparents' motion the day after Candy's rights were terminated in March.

**¶4** The juvenile court heard the grandparents' motion in May 2007. The grandparents argued that they had been involved and had participated in the case as much as they were permitted since the dependency proceeding had commenced. They asserted that they had tried "to do whatever they need[ed] to do to get involved in this case." Conceding their request for greater participation earlier in the case had been denied, they explained the situation had changed since that time because both parents' rights had been

terminated, justifying their intervention at that point. The court denied the motion, and this appeal followed.

**¶5** Rule 24(b)(2), which was the basis for the grandparents' motion and which pertains to the permissive joinder of parties, applies to juvenile cases. *See William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385, ¶ 7, 965 P.2d 1224, 1226 (App. 1998); *see also* Ariz. R. P. Juv. Ct. 37 (incorporating Ariz. R. Civ. P. 24). In *Bechtel v. Rose*, 150 Ariz. 68, 73, 722 P.2d 236, 241 (1986), our supreme court articulated the test for determining whether grandparents should be permitted to intervene in dependency and parental termination proceedings. As we recently stated in *Allen*, "our supreme court determined [in *Bechtel*] that a child's grandparents 'should be allowed to intervene in the dependency process unless a specific showing is made that the best interest of the child would not be served thereby.'" *Allen*, 214 Ariz. 361, ¶ 10, 153 P.3d at 385, *quoting Bechtel*, 150 Ariz. at 73, 722 P.2d at 241. Thus, "[i]f the conditions of Rule 24(b) are met, . . . then the juvenile court must determine whether the party opposing intervention has made a sufficient showing that intervention is not in the child's best interest." *Id*. ¶ 12.

**¶6** The court in *Bechtel* specified that, "[b]efore ruling on a motion to intervene, the juvenile court should consider and weigh the relevant factors identified [in the opinion], and only if they show that intervention would not be in the best interest of the child should intervention be denied." 150 Ariz. at 74, 722 P.2d at 242. The factors include the following:

> "[T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented."

*Id*. at 72, 722 P.2d at 240, *quoting Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (footnotes omitted in *Bechtel*).

**¶7** The grandparents contend the juvenile court abused its discretion in denying their motion because, they argue, *Bechtel* created a presumption in favor of grandparents' intervention, and ADES failed to sustain its burden of establishing their intervention was not in the child's best interests. The grandparents maintain that the court's findings of fact and conclusions of law to the contrary were based solely on statements by counsel rather than on evidence presented at a hearing or by verified statements. They complain that no expert testimony was introduced to support ADES's contentions that the child had bonded with her foster parents who wished to adopt her and that disruption of that relationship would be detrimental to Anjali. The grandparents also fault the court for having relied on the results of a home study conducted in Texas that recommended Anjali not be placed with them. They assert they did not have the opportunity to challenge that finding because they

were not parties to the proceedings in this case, and they fault ADES for failing to request a reexamination of the recommendation by the State of Arizona.

**¶8** As discussed below, the record establishes the juvenile court considered the *Bechtel* factors carefully and appropriately. Additionally, the grandparents cite no authority for the proposition that avowals and argument of counsel opposing a motion to intervene may not be the basis for a juvenile court's ruling on such a motion and that expert testimony and affidavits are the only means of establishing grounds for denying such a motion. *See* Ariz. R. Civ. App. P. 13(a)(6). We note, too, that the grandparents did not present formal evidence and relied on their attorney's arguments and avowals as well. Nor did the grandparents make this argument below, thereby waiving it. *See Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 24, 158 P.3d 225, 232 (App. 2007); *In re Pima County Juv. Action No. S-113432*, 178 Ariz. 288, 292, 872 P.2d 1240, 1244 (App. 1993). Moreover, the court had before it the record in the dependency and severance proceedings, as well as the rulings in these proceedings. For example, in the order terminating the mother's rights, the court found Anjali had been placed with foster parents who wished to adopt her.

**¶9** Despite the grandparents' contention that they had tried from the beginning to be involved in the dependency proceeding involving Anjali to the fullest extent possible, the grandparents did not actually seek to intervene in the proceedings until February 2007, three months after ADES had filed its motion to terminate Candy's parental rights. The grandparents' attorney tried to explain their reasons for not pursuing the motion sooner,

stating that, at that point, "both parents were still involved with the case and reunification was still one of the case plan objectives. However, significant changes have occurred since that time. The mother's parental rights have been severed. The father has relinquished his parental rights." Nevertheless, as ADES points out, they could have sought intervention sooner.

**¶10** More importantly, an abundance of information relevant to the *Bechtel* factors was presented at the hearing on the motion to intervene. The court asked about the strength of the grandparents' bond with Anjali at that point. The court also explored with William and counsel, William's Native American ancestry; William conceded he was not an enrolled member of an established tribe. Counsel pointed out to the court the kinds of benefits that might be available to the child should William enroll in a tribe at some point.

**¶11** The court then turned specifically to the issue of Anjali's best interests, noting that she was two-and-a-half years old and had been living with her foster parents since she was three months old. When the court asked the grandparents' counsel to respond to whether removing Anjali from that environment could be harmful, counsel stated: "Well . . . my common sense would tell me that she's probably bonded with the foster parents, and there would probably be some harm to her if she were removed." After asking what benefits there could be that would justify that kind of harm, the court explored with the grandparents and their counsel the possible ties to a registered tribe and the benefits of such a connection. William explained to the court his own experience of finding out about his ancestry,

suggesting it could be important to Anjali at some point in her life, but William's counsel conceded that, at that point, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 through 1963, was inapplicable. The court also questioned the grandfather about his home situation, other children in the family, and other relevant factors, including that he was unemployed at the time because of a disability and that his wife was employed.

**¶12** The court then permitted counsel for Anjali to state his position, questioning him as it had questioned William and his counsel. Anjali's counsel noted, without objection, the strength of the bond between Anjali and her foster parents. He also noted that the grandparents could have filed a motion to intervene as early as December 2004. The court emphasized that two years had passed before the grandparents had moved to intervene.

**¶13** Anjali's counsel went on to explain that the home study in Texas had resulted in a rejection of the grandparents as a placement for Anjali. Counsel asserted that, although placement of Anjali could not, therefore, occur, the question that remained was whether the foster parents, who intended to adopt Anjali, would allow the grandparents to have contact with her. Counsel avowed he had spoken to the foster parents and that they would permit the contact so long as it was in Anjali's best interests and was not disruptive.

**¶14** Next, the court permitted counsel for ADES to state the department's position. And, again without objection, counsel provided significant information that the court relied on in denying the motion to intervene. Counsel avowed, for example, that Anjali's therapist and the child psychologist had stated that children are flexible for up to eighteen months or

two years in a placement, but changing a placement after they have bonded with a caregiver would be detrimental to the child. Counsel discussed the fact that the Texas agency had ultimately determined that neither the maternal nor paternal grandparents' homes would be suitable placements for Anjali and noted, as Anjali's counsel had, that the psychologist had made clear the child would suffer emotional harm if her placement with the foster parents were to be changed, given that she had been with them since she was about three months old.

**¶15** With respect to the possible implications of the grandfather's membership in a tribe, including the possible application of ICWA, counsel for ADES stated ADES had sent letters to the Cherokee Nation and determined that Anjali was not eligible for membership in the tribe, prompting the juvenile court judge who presided over the termination proceeding to find ICWA was not applicable. Counsel confirmed, upon questioning by the court in this proceeding, that ICWA was inapplicable for purposes of the motion to intervene. She stated:

> I can make an offer of proof to the Court that [William] has had extensive amounts of contact with my client at the very high levels of management, constant phone calls, constant requests for information, constant promises of information that my client has not received, and constant promises that he is going to get information about the Indian Child Welfare Act.

She added that William had requested and had been given ample opportunity to participate in the proceedings and had been kept apprised of the status of matters over the years, characterizing his suggestion to the contrary as "disingenuous . . . it is not correct."

**¶16** Next, the court specifically focused on *Bechtel* and the factors it required the court to consider in deciding the motion. The court's comments and the dialogue that ensued between the court and counsel reflected, as do the court's findings of fact and conclusions of law, that the court clearly understood the *Bechtel* test and how to apply it appropriately. The court correctly noted that it was to focus on whether intervention by the grandparents was in Anjali's best interests and that it was also required to consider the nature and extent of the grandparents' interests and whether parties to the proceedings had represented those interests adequately. Counsel for the grandparents conceded that, ultimately, ADES did look out for and serve their interests when it caused a home study to be done to explore Anjali's possible placement with them.

**¶17** Noting that it was required to consider delay under *Bechtel*, the court asked ADES's counsel about the delay that could be expected if the grandparents were to further explore matters relating to their interests, including the possible application of ICWA. Finally, the court asked counsel for ADES what factors specifically the court had to consider and find in order to comply with *Bechtel*. Counsel responded by outlining those factors clearly and correctly applying them to this case. The court adopted those findings of fact at the close of the hearing, denying the motion to intervene and directing ADES to prepare formal findings of fact and conclusions of law in accordance with what had been stated on the record, which ADES did. Those findings and conclusions establish, as we have stated, that the juvenile court understood and correctly applied the *Bechtel* factors.

**¶18** Although the court did consider Anjali's possible placement with the grandparents, the record belies the grandparents' contention that the court "focused upon . . . child placement" as the "ultimate issue." The court considered it among the other relevant factors. Moreover, it was the grandparents who focused to a large degree on Anjali's possible placement with them if they were permitted to intervene and explore the issue further, which required the court to consider it, particularly in conjunction with the question of undue delay. Similarly, we reject the grandparents' suggestion that it was improper for the court to consider the possible application of ICWA in connection with the issue of delay. Rather, the record shows the court was careful in determining whether ICWA might apply, the delay that exploring its possible applicability might cause, and whether its application would change the factors the court was required to consider in deciding whether to permit the grandparents to intervene. The court's questioning of counsel about the issue of ICWA, including the implications ICWA would have on delay, was entirely appropriate in light of the factors articulated in *Bechtel*.

**¶19** The grandparents have not sustained their burden of establishing the juvenile court abused its discretion by denying their motion. *See Allen*, 214 Ariz. 361, ¶ 9, 153 P.3d at 385. We therefore affirm the court's order.

_____

JOHN PELANDER, Chief Judge

CONCURRING:

_____

JOSEPH W. HOWARD, Presiding Judge

_____

J. WILLIAM BRAMMER, JR., Judge